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No. 163] NEW DELHI WEDNESDAY, DECEMBER 17, 1952

ELECTION COMMISSION, INDIA

NOTIFICATIONS

New Delhi, the 17th December, 1952

S.R.O. 2071.—WHEREAS the election of Shri A. J. Arunachalam of Pichanoor, Gudiyattam and Shri A. M. Ratnaswami of Kosa Annamalai Street, Gudiyattam to the Madras Legislative Assembly from the Gudiyattam constituency of that Assembly, has been called in question by an Election Petition duly presented under Part VI of the Representation of the People Act, 1951 (XLIII of 1951), by Shri Kannabiran of Brahmin Street, Gudiyattam;

AND WHEREAS the Tribunal appointed by the Election Commission, in pursuance of the provisions of section 86 of the said Act for the trial of the said Election Petition, has, in pursuance of the provisions contained in section 103 of the said Act, sent a copy of its Order to the Commission:

NOW, THEREFORE, in pursuance of the provisions of section 106 of the said Act the Election Commission hereby publishes the said Order of the Tribunal.

BEFORE THE ELECTION TRIBUNAL, VELLORE.

PRESENT:

Sri M. Anantanarayanan, I.C.S.—*Chairman*

Sri P. Ramakrishnan, I.C.S. *Member*

And

Sri B. V. Viswanatha Aiyar, B.A., B.L.—*Member.*

Thursday, the fourth day of December, one thousand nine hundred and fifty-two.

ELECTION PETITION 109 OF 1952.

Dr. Kannabiran—*Petitioner*

Versus

1. Sri A. J. Arunachalam
2. Sri A. M. Ratnaswami
3. Sri P. S. Rajagopal Naidu
4. Sri M. Dhanapal

5. Sri G. M. Annalthango
6. Sri Palani Ayya
7. Sri J. J. Dass
8. Sri Porkodian
9. Sri A. Govindaraj
10. Sri T. Manavalan
11. Sri C. A. Kannan
12. Sri P. S. Krishnamoorthi
13. Sri S. L. Ramaswami Naidu
14. Sri V. K. Kothandaraman—*Respondents.*

This is an Election Petition under Section 80 of the Representation of the People Act, XLIII of 1951, praying to declare that the Election of the first respondent from the Gudiyattam Constituency of the Madras State Assembly to be void, and that the petitioner or the third respondent has been duly elected, or to declare that the Election to the Madras State Assembly from the Gudiyattam Constituency to be wholly void and to award the costs of this petition.

This Election Petition coming on for orders before us on the 29th day of November, 1952, upon perusing the petition and counters thereto, and after hearing Sri *D. Munikanniah, R. D. Indrasenan* and Sri *P. Srinivasachariar*, Advocates for the petitioner, K. Bashyam and Sri V. C. Sadasivam, Advocates, for the first respondent, Sri P. S. Sabhesa Aiyar, Advocate, for the 3rd respondent, the Government Pleader, Sri N. K. Vijiaraghavan, appearing for the State, and the rest of the respondents being absent *ex-parte*, and having stood over till this day for consideration, the Tribunal Court, delivered the following

JUDGMENT

The first respondent, Sri A. J. Arunachalam, was declared elected for the Madras State Legislative Assembly from the Gudiyattam Constituency in the recent elections. The petitioner, one of the defeated candidates at the election, files the petition under Section 80 of the Representation of the People Act, XLIII of 1951.

2. The petitioner's allegations were these:

At the time of the scrutiny of the nomination papers on 28th November 1951, by the Returning Officer for the constituency, the 3rd respondent, Sri P. S. Rajagopal Naidu, had filed an objection to the acceptance of the nomination of the first respondent, Sri A. J. Arunachalam, the elected candidate, on the ground that he was disqualified to stand, by reason of a contract, dated 16th August 1950, entered into between him and the State Government, whereby he was appointed a "State nominee" for the distribution of bales of yarn in the North Arcot District. The statutes and several orders, passed by the State Government from time to time, cast on the State Government, the duty of regulating or prohibiting the production, supply and distribution and transport of essential articles and trade therein, and "the service undertaken to be rendered by the Government, rendered the contract entered into by the first respondent with the State Government, as one coming under Section 7(d) of the Representation of the People Act, and operated as a disqualification, so as to disentitle the first respondent from seeking election as a member of the State legislature." These objections were pressed before the Returning Officer. Nevertheless, he held that there was no disqualification, and accepted as valid, the nomination of the 1st respondent. There was also an allegation in the petition, that the first respondent, by virtue of his being a State nominee for the distribution of yarn, must be deemed to have held an office of profit under the State Government, and as such, he would be disqualified under Article 191 of the Constitution of India, and, on this ground also, the Returning Officer should have rejected the nomination of the first respondent, but the allegation was not pressed, at the time of the hearing.

3. At the election, the first respondent was declared duly elected. The 3rd respondent secured the second largest number of votes, and the petitioner secured the third largest number of votes. It was mentioned that, if the election of the first respondent was to be set aside, it would be necessary to declare the 3rd respondent as duly elected. But, after the announcement of the results of the elections to the State Legislature, the 3rd respondent had since been elected to the Council of States, and, therefore, the petitioner claimed a declaration in the petition, that he was the candidate duly returned, consequent upon the setting

aside of the election of the first respondent. The petitioner sought the following reliefs:—

(a) to declare that the election of the 1st respondent to be void;

(b) to declare that the petitioner, or the 3rd respondent, to have been duly elected; or

(c) to declare the election to be wholly void.

4. It may be mentioned that, to the original petition, only 9 respondents were impleaded as parties. But on an objection taken that it would be necessary, under Section 82 of the Representation of the People Act, that all the candidates who were duly nominated at the election, should be impleaded as parties, this Tribunal, by an order on 31st October 1952, permitted the addition of 5 duly nominated candidates as respondents 10 to 14, by an amendment to the petition. Thus, there were 14 respondents before the Tribunal, out of whom, respondents 2 and 4 to 14 were *ex-parte*, and only respondents 1 and 3 raised contest, and filed counters.

5. The first respondent in his counter alleged thus:

He, along with 50 others, were wholesale dealers in yarn, and held licences for that purpose, for which they deposited Rs. 500 as security. Under the terms of the licence, they purchased yarn from mills, and sold them to licensed dealers. On the representation of the mill owners, and for their convenience, the Government adopted the scheme of nominating a few of the wholesale dealers as nominees, who have to purchase bales of yarn from the mills and sell them to other licensed dealers. But this new scheme was only the old scheme of licensing, with slight modifications, and there was no difference in principle between the old system and the new, as would be clear from the language, and the terms and conditions of the agreement, and also as no fresh scheme was made. The above-mentioned agreement did not, in law, amount to a contract, and no contractual relationship existed between the Government and the 1st respondent. The agreement was no more than a licence, or permission, to purchase from mills and sell to dealers, subject to the controlled prices, and there was no question of a contract. Further, whatever obligation or duty was undertaken by the Government or the 1st respondent, it arose out of a provision in the statute, and was not contractual. It was asserted by the first respondent, that the obligations cast upon the Government by the Essential Articles, Control Act, did not amount to any service undertaken by the Government under Section 7(d) of the Representation of People Act, and, especially, in the case of the distribution of yarn, the Government had no financial responsibility and did not become the owner of the goods, at any stage of the transaction. For these reasons, it was contended that the 1st respondent was not subject to the disqualification under Section 7(d) of the Representation of the People Act. It was also asserted that the 1st respondent was not disqualified under Article 191 of the Constitution, as a person holding an office of profit. For these reasons, it was contended that the Returning Officer acted legally in accepting the nomination of the first respondent. Adverting to the reliefs, sought by the petitioner, it was contended that, if, for any reason, the Tribunal held that the first respondent was not legally elected, then the whole election had to be set aside, and fresh election ordered. There was also an allegation that, as the petitioner had not submitted his return of election expenses, he became disqualified under Section 7(c) of the Representation of the People Act, and so, the petition filed by him was not maintainable.

6. The third respondent in his counter admitted that he filed objections before the Returning Officer, for the nomination of the 1st respondent, on the ground of his disqualification under Section 7(d) of the Representation of the People Act, because he was appointed as a State nominee by the State Government. On the Returning Officer's overruling the objection, the third respondent even filed a writ petition before the High Court, which was, however, dismissed on a preliminary objection. This respondent supported the contention of the petitioner that there was a contract between the State Government and the first respondent. Originally, he prayed that, in the event of the first respondent's election being set aside, he (the third respondent) might be declared elected. But, thereafter, he did not take any active part at the hearing of the petition, presumably because he had been elected subsequently to the Council of States.

7. The following issues were framed:

(1) Whether the election of the first respondent is void, and liable to be set aside because of the alleged disqualification under Section 7(d), arising from the alleged contract between the first respondent and the Government as set forth in paragraph 5 of the petition?

(2) Whether, if the election of the 1st respondent is liable to be set aside upon issue 1, the 3rd respondent has any right to a declaration that he has been duly elected instead?

(3) Whether, in case the election is liable to be set aside and the 3rd respondent is not entitled to be declared duly elected, instead, the petitioner is entitled to be declared elected?

(4) Whether, in case the election of the 1st respondent is liable to be set aside, the Tribunal has to declare the election as entirely void, under the terms of Section 100(1)(c)?

8. It may be mentioned initially, that the contention that the petition was not maintainable by reason of the failure of the petitioner to submit a return of election expenses, is no longer of any importance, because, subsequently, he has submitted such a return, and the disqualification had been removed under Section 144 of the Representation of the People Act, by the Order of the Election Commissioner, which has been marked as Exhibit A-6.

9. *Issue* 1.—The acceptance of the first respondent's nomination paper by the Returning Officer, in his order dated 30th November 1951, marked as Exhibit A-5, is attached by the petitioner as well as the 3rd respondent, on the ground that, at the relevant period, the 1st respondent had the disqualification stated in section 7(d) of the Representation of the People Act, which reads thus:

"If, whether by himself, or by any person, or body of persons in trust for him, or for his benefit, or on account of his having any share or interest in a contract for the supply of goods to, or for the execution of any works, or the performance of any services undertaken, by, the appropriate Government."

This provision, so far as it is necessary for this case, can be split up into three ingredients: (1) the candidate must have a share or interest in a contract; (2) the contract must be for the performance of any services undertaken by the Government; and (3) the Government in question must be the appropriate Government, which has been defined in section 9 of the Act, to be the State Government, for this case.

10. The petitioner has to make out that all the three ingredients are satisfied in the case of the 1st respondent, in order to bring him within the scope of the disqualification. There was no contest before us that the words "contract for" used in section 7(d) must be used to govern also the clause "the performance of any services", which is the last of three clauses in series in the sub-section, and this view, we find, has been upheld in a decision of an Election Tribunal in Sourashtra State, in Election Petition No. 1 of 1951, a copy of which has been shown to us.

11. The first point, to be determined is, whether there was a contract, and, as alleged by the petitioner, it was between the petitioner and the State of Madras. We may note that section 7(d) does not say, unlike certain English enactments on the subject which will be referred to at the end of this judgment, that the contract must be *with* the Government. The petitioner has marked the actual deed of agreement as Exhibit A-4, which is on a stamp paper for Rs. 1-8-0, between "His Excellency the Governor of Madras on the one part, and Sri A. J. Arunachala Mudaliar (the 1st respondent) on the other part, described hereinafter as the State nominee, which expression, where the context so admits, shall include the 1st respondent's heirs, executors, administrators, legal representatives and assigns."

12. Before examining the agreement further, it will be useful to give, at the outset, a brief account of the procedure for the distribution of yarn, in the course of which, the scheme of selecting State nominees was introduced in this State, as well as the relevant Acts and orders passed by the Central and the State Governments from time to time, in the matter of distribution of yarn.

13. To begin this narrative, we cannot do better than refer to the succinct account of the scheme for yarn distribution, given in a recently reported decision of our High Court, in 1951-I.M.L.J. page 532 (*Lotus Industrials* versus *the State of Madras*) based on an affidavit filed by the Director of Controlled Commodities:—

"Under the scheme, the Government of India takes over the entire yarn produced in the Indian Union, after permitting the various composite mills to retain for the production and consumption of their weaving sections the yarn produced by their spinning sections. Out of the balance of yarn, the Central Government retains a portion for Government purposes and a portion for export to foreign countries, and

leaves the balance for internal distribution in the country. Such balance of yarn, called, 'free yarn' is pooled together and distributed to the various States for supplying the consumers in their respective areas. The quotas of yarn for the respective States are fixed by the Textile Commissioner at Bombay. Thereafter, the Director of Controlled Commodities at Madras is in charge of the distribution within the State. This distribution is in accordance with the principles laid down in Government orders issued from time to time."

14. We have next a Government Order, G.O.Ms. No. 230, dated 20th January 1950, in the Development Department, Government of Madras, marked as Exhibit A-3, which reads thus:

"With a view to ensure that the entire yarn placed at his disposal, is lifted from the mills regularly and promptly, without allowing it to lapse, the Director of Controlled Commodities, has submitted proposals for appointing a limited number of capable and solvent dealers as provincial nominees in each district, from among the licensed dealers themselves, for the specific purpose of lifting yarn from the mills, and distributing it to the other dealers in the district. The Government approve the proposals of the Director, subject to the following modifications:—

(1) the number of provincial nominees should be fixed according to the needs of each district, but should not be more than 6, or less than 3 for a district;

(2) a list of nominees selected should be submitted to the Government for their prior approval;

(3) The commission to be allowed to the provincial nominees should be limited to 11/8th per cent. of the ex-mill prices."

15. So, it is clear that the initiative for starting the scheme of State nominees came from the Director of Controlled Commodities of the State Government, whose proposals were approved by the Government in the above-mentioned Government Order, and thereafter, the full details of the scheme were worked out. The details of the working of the scheme are embodied in the terms of the agreement itself, marked as Exhibit A-4, and, they are briefly these:

Each Collector has to distribute the weaving centres in the District among the State nominees approved by the Government. The nominee then submits an indent to the Collector, who, then, consolidates and prepares an indent for the requirements of the district, according to the revised procedure laid down by the Textile Commissioner, Bombay, in respect of the yarn distribution, commencing from 1950. The mills were expected to offer to the Director of Controlled Commodities, by the 7th of each month, 2/3rds of their production. Out of the total quantity of yarn so distributed, after setting apart certain requirements, for example, by the Provincial Co-operative Societies, and the consumer quota holders, the balance would be distributed to the State nominees, on the basis of the indents supplied by the Collectors. The State nominees should then enter into firm contracts with the mills for the purchase and lifting of the bales accepted by them. In the meantime, the Collector should prepare a list of the licensees to whom the bales were to be distributed by the nominees. If the Collector failed to furnish the above list by a prescribed date, the nominees would be at liberty to sell the bales to other licensees within the district charging a commission of 1¼ per cent. But, if the Collector supplied the list within the time allowed, the State nominees should intimate the licensees to take the bales allotted to them on payment of 25 per cent. of the price in advance. Within 5 days of the receipt of such intimation, the licensees should inform the nominee about their acceptance of the bales, and pay 25 per cent. of their value. If the licensees subsequently failed to take delivery of the bales accordingly, the nominees should be at liberty to sell the bales to other licensees in the district, with a commission of 1¼ per cent. The State nominees could also distribute to any licensee or consumer within the district, all the bales not taken delivery of by the licensees, according to the procedure explained above, within 10 days of the receipt of the bales by them, and in respect of the sale of these bales, the State nominees were to get a profit not exceeding 6¼ per cent. over the ex-mill prices.

16. It may be mentioned, in this connection, that the system of State nominees, received statutory recognition, in an amendment to the Madras Yarn Dealers Control Order, made by G.O.Ms. No. 4408, Development, dated 14th October 1952, and published in the Rules supplement of the Fort St. George Gazette, dated 29th

October 1952 where a *State nominee* has been defined as a "Person who receives all, or a specified number of bales of Yarn due to a district from the mills and distributes the bales so received, to the yarn licensees of the district, as may be specified by the Director or the Collector, from time to time" There were 4 State nominees for the North Arcot District, in the relevant period, of whom, the 1st respondent was one

17 After the above summary of details of the State Nominee Scheme, the terms of the agreement between the first respondent and the State of Madras, which has been marked as Exhibit A-4, and its legal implications can be considered Under Article 299 of the Indian Constitution "All contracts made in the exercise of the executive power of the Union or of a State, shall be expressed to be made by the President, or by the Governor, as the case may be" So, it is important to note that in the agreement under consideration, His Excellency the Governor of Madras, has joined as party of the one part along with the first respondent as party of the other part The form of the agreement satisfies the rule in Article 299 of the Constitution for contracts entered into with the State Government The obligation cast on the State nominee by the agreement, is that he would be bound by the terms, conditions and procedure set out in the scheme, and will be entitled to charge a commission to the extent and subject to the conditions specified therein, and shall carry out all the instructions as might be issued, from time to time, by the Director of Controlled Commodities, or by the Collector of the District, in connection with the subject-matter of the agreement Then, there follows clause (4), which provides that the agreement may be determined at any time by either of the parties, giving the other, one calendar month's time, by a notice in writing, clause 5 provides that "If the State nominee commits any default in carrying out any of the conditions set out previously, the sum of Rs 500, which had been deposited by him for the due fulfilment and proper discharge of his undertakings in his capacity as licensee, or any part thereof, shall be forfeited to the Government, on the orders of the Director, without prejudice to any other rights and remedies that the Government might have against him in respect of such default"

18 It was contended by Sri K Bashyam, the learned Counsel for the 1st respondent that this agreement is not a contract, but is only a licence, super-imposing certain fresh duties, and obligations on the 1st respondent, who was already at that time along with another partner, a licensee, and who had been granted a licence in form No B, under the Yarn Dealers Control Order, 1948, for retail dealing in yarn That the 1st respondent at that time was a retail dealer in yarn, who had made a deposit of Rs 500 under the terms of his licence, is admitted by the petitioner, and some of the licences issued to him have also been marked as exhibits. The learned Counsel Sri K Bashyam, also contended that the agreement, Exhibit A-4, was not supported by consideration, that there was no mutuality of obligation cast on the Government, that, in effect, the agreement added only some more duties and obligations to the 1st respondent as licensee, giving, in the picturesque phrase of the Counsel, "to the naked licensee, a garment", and that he remained, after the agreement only a licensee, and that the agreement was, in effect, nothing more than a licence On the first point about consideration, it is obvious, on a consideration of the background of the scheme, that the appointment of the 1st respondent as one of the four State nominees for the entire district of North Arcot, altered his position fundamentally from what he was previously, namely, one of the many licensed retail dealers in the District As State Nominee, he got the valuable advantage of purchasing, by firm contracts with the mill owners, the quota of yarn allowed to the District and then selling the quota, in the first place, to licensed dealers, according to the indents prepared by the Collector, charging a profit of 1¼ per cent and, in the case of failure of the licensees to purchase, within a short time limit, he had a right to sell to other licensees, again charging 1¼ per cent and in the event of these licensees not taking the stock within another short time limit of 10 days, to sell to other licensees and even to consumers, charging a higher profit of 6¼ per cent A limited number of four State nominees appointed for the entire district of North Arcot, thus acquired the valuable privilege of gathering into their hands, the monopolistic purchase, of the quota of yarn allotted to the district and of selling at a small margin of profit, provided the licensees concluded their bargain within a short interval, and in the event of their failure to do so, of selling at a much larger profit to other licensees and even to consumers. Thus, very valuable consideration must be deemed to have passed to the State nominees by virtue of the agreement In answer to a possible argument, that such consideration did not proceed from the Government, it will be sufficient to observe that under the Indian Contract Act, it is not necessary that the consideration should move from the promisor It would be a valid consideration, even if it moves from a third party Even otherwise, as we will consider presently in the succeeding paragraphs, in passing the above and other orders the Government took into their hands, the task of effecting an equitable distribution of yarn inside the State, as

a part of an essential service to the community, and by the agreement, surrendered an important phase of this service to the State nominees Thus, an important phase of an obligation and a duty, which the Government had undertaken in the matter of distribution of an essential commodity, was assigned by the agreement to the State nominees In the case of failure to discharge the obligation, the Government reserved to themselves the right to forfeit a portion of the deposit made by the State nominees as licensees, and also reserved to themselves such other remedies as they thought fit to seek against the State nominees There is also the important clause that the agreement could be determined by either of the parties, on the giving of one month's prior notice

19 We have carefully examined the agreement with reference to the provisions of the Contract Act, and with reference to the terms of the State Nominee Scheme, and we are of the definite opinion, that the agreement involved mutuality of obligations between the two parties to the agreement a clause of penalty by forfeiture, besides other remedies, and a clause about the termination of the agreement after mutual notice, and we have also considered above, that valuable consideration passed for the agreement The agreement has to be viewed only as a contract, as known to law and not as a licence The essential features of a licence, namely, the absence of mutuality, and the one-sided nature of the obligations imposed, are absent in this case That the forfeiture clause fastened itself upon a pre-existing deposit appears to make no difference because it is possible to fasten upon an earlier deposit made for the licence as dealer, a further lien, as penalty for breach of the agreement

20 The next question to be considered is whether there has been, in this case, a service undertaken, as defined in section 7(d), and whether such an undertaking was by the State Government As regards this aspect of the case, it will be necessary to give a brief resume of certain Acts and statutory orders The State Government passed The Madras Essential Articles, Control and Requisitioning (Temporary Powers) Act, 1946 Act XIV of 1946 on 28th September 1946, and took upon itself the power under Section 3 of that Act, to pass orders for "regulating or prohibiting the production, supply, distribution and transport of essential articles and trade and commerce therein, for the avowed object "of maintaining, or securing the supplies of essential articles, or for arranging for their equitable distribution and availability at fair prices" Soon after this, the Central Government passed the Essential Supplies (Temporary Powers) Act of 1946, Act XXIV of 1946 on 19th November 1946 Section 3 of which closely follows section 3 of the earlier Provincial Act It may be mentioned that these Acts were passed soon after the various Ordinances under the Defence of India Rules during the duration of the War, lapsed at the conclusion of the War In the Central Government Act, just referred to, in the definition in Section 2 an essential commodity included cotton and woollen textiles Section 4 of the Central Act XXIV of 1946 provided that "the Central Government may, by a notified order, direct that the power to make orders under Section 3 shall in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by the Provincial Government" Under Section 5, the Central Government could also give directions to any provincial Government as to the carrying into execution in the province, of any order made under Section 3 Thereafter, there was a delegation, under Section 4 to the Provincial Government, in an Order of the Central Government No 73, I T A 46 dated 28th December 1946, which was published in the Fort St George Gazette, dated 11th February 1947, Part II, page 106 to the following effect

> "In exercise of the powers conferred by Section 4 of the Essential Supplies (Temporary Powers) Act, 1946, the Central Government is pleased to direct that the powers conferred on it by sub-section (1) of Section 3, to provide for the matters specified in clauses (c) to (j) of sub-section (2), shall in relation to cotton textiles, be exercisable also by any Provincial Government subject to the condition that no order made by a Provincial Government, in the exercise of the aforesaid powers, shall have effect if it is repugnant to any order made under the said sub-section by the Central Government"

21 In pursuance of the above delegation the Madras Government passed the Madras Yarn Dealers Control Order 1948 dated 16th September 1948 which, in its preamble refers to Central Act XXIV of 1946, read with the notification of the Government of India, just cited dated 28th December 1946 and also Section (3) of Madras Act XIV of 1946, as the sources of the authority for passing the order. This order referred directly to yarn distribution, and was admittedly in force at the time the agreement we are concerned with was executed on 16th August 1950, and also during the time of the filing of the nomination of the first respondent and the acceptance of the nomination, and is in force even now, because an amendment

of the Yarn Dealers Control Order, dated 14th October 1952 (G.O.Ms. Development dated 14th October 1952, Fort St. George Gazette, Part II, dated 29th October 1952) has such an implication. Under rule 14 of this order, "the Commissioner or the Collector may, with a view to securing a proper distribution of yarn, direct any dealer, or any class of dealers to sell such quantities of yarn to such person or persons as may be specified in the direction, or not to sell or deliver any yarn of a specified designation, except to such person or persons and subject to such conditions as may be specified in the direction, and may issue such further instructions, as he thinks fit, regarding the manner in which the direction has to be carried out". It is under this order that the licences for retail and wholesale dealers were issued, and the 1st respondent, at the time he became a State nominee, was along with a partner, one such retail dealer. It may also be mentioned that the Madras Government passed on 15th December 1949 Act XXIX of 1949, the Madras Essential Articles Control and Requisitioning (Temporary Powers) Act, superseding Act XIV of 1946, and in the amendment to the Yarn Dealers Control Order in 1952, the Madras Act XXIX of 1949 and the Central Act XIV of 1946 are referred to, implying that, after 1949, the relevant Acts in force, were the Central Act XXIV of 1946 and Madras Act XXIX of 1949, besides the Madras Yarn Dealers Control Order of 1948.

22. It will be clear, from a perusal of Section 3 of the Central Act XXIV of 1946, Section 3 of Madras Act XXIX of 1949, and the Madras Yarn Dealers Control Order of 1948, that both the Central and the State Governments had taken upon themselves an essential service, for the equitable distribution, and the availability at fair prices, of yarn and other essential commodities. Therefore, it cannot be doubted that the State nominee system, which was introduced as an integral part in the scheme of distribution of yarn at a fair price to consumers and licensed dealers, formed a service undertaken by the Government in the interest of the community. In this context, the observations of the Chief Justice of the High Court of Madras in 1952 I.M.L.J. page 514, at page 523 can be quoted, "I quite realise that during periods of acute shortage of essential goods and commodities, it is not only desirable but also imperative that the State should take steps to regulate their purchase and sale, with a view to an equitable distribution among all consumers.

23. Now, we come to the ground urged before us, very strenuously, by the learned Counsel Sri K. Bhashyam for the first respondent, that in performing this service, the State Government acted only as an agent of the Central Government, which had taken the initiative in the matter of distribution and control by enacting the Central Act XXIV of 1946. There are obvious difficulties in accepting this argument. As already mentioned, even prior to the Central Act XXIV of 1946, the Madras State, in enacting Act XIV of 1946, had also taken similar powers, for controlling the distribution of essential commodities. The history of legislation even prior to 1946, would show that both the Central and the State Governments, from time to time, were passing orders under the Defence of India Rules, for controlling the distribution and prices of essential commodities. After the coming into force of the Constitution on 26th January, 1950, "trade and commerce, and the production, supply and distribution of the products and of industries, where the control in such industries by the Union, is declared by Parliament by law, to be expedient in the public interest" are comprised in item 33 in the concurrent list of the 7th Schedule of the Constitution. Under Article 251 of the Constitution, "nothing in Articles 249 and 250 shall restrict the power of the legislature of a State, to make any law which, under this Constitution, it has power to make, but if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament, which Parliament has, under the said Articles, power to make, the law made by Parliament, shall prevail and the law made by the Legislature of the State shall to the extent of the repugnancy, be inoperative." The Central Government's notification No. 73(i) T.A. 46, dated 28th December 1946, delegating power to the Provincial Government under Section 4 of the Central Act XXIV of 1946, though it was issued long before the enactment of the Constitution, contains the same principle, and states that the power to issue orders in relation to cotton textiles, can be exercised by the Provincial Government, subject to the condition that such orders will not have effect in so far as they are repugnant to orders passed by the Central Government. The spirit of the orders thereafter issued by the Central Government and the Provincial Government for the control and distribution of essential commodities, seems to have been that both the authorities exercised concurrent jurisdiction in the same service of controlling the sale and prices of essential commodities but the operation of their orders was to be complementary and not conflicting, and the orders of the Provincial Government, were to be effective so long as they were not repugnant to the orders of the Central Government. This appears to be the real position based

on the Statutory orders, so far as they have been explained before us. Therefore, when a State Government, passed orders even if it acted under the power delegated by the Central Government, such exercise of the power, cannot be construed to mean that the Provincial Government was acting as the agent of the Central Government. In the particular sphere in which the Provincial Government exercised the power of distribution and control, it must be deemed to have been acting on its own initiative, for securing services and supplies essential to the community, and not as agent of the Central Government for the purpose. It appears to us, that the plea of agency propounded by the learned Counsel for the first respondent, cannot be inferred from the various statutory orders, and such a plea, we may state incidentally, was urged only at the hearing of the petition, and was not urged in the counter of the first respondent, or at any time previously.

24. Further, we have got also to mention, that there is absolutely no circumstance or evidence to show that the scheme of State nominees, had its origin, in any order or direction by the Central Government. In actual practice, it appears to have been the case, that the Central Government's Textile Commissioner, allotted quotas of yarn to each State, to be supplied by the mill owners according to the All India Yarn Distribution Scheme, a gist of which has been given at the beginning of this judgement, and thereafter it was left to the State Governments and their officers, like the Director of Controlled Commodities, to prescribe the details of the internal scheme of distribution, within the State, and pass suitable orders for this purpose. It was at this phase of the scheme of distribution of yarn within the four corners of the State, that the administrative orders commencing from G.O. No. 280 Ms. Development, dated 20th January 1950 (Exhibit A-3 in the case), were passed by the Provincial Government, initiating the State Nominee Scheme, and making detailed provisions for its working. For arranging for this manner of distribution, the initiative came from the State Government, and it cannot be, in our opinion, contended with any justification, that the State Government was acting as the agent of the Central Government. It also appears, on a perusal of the agreement, that in form and purport, it was entered into with the State Government in the manner provided by the Constitution, for contracts with the State Government, implying thereby clearly, that it was the State Government that had undertaken the service. If the State Government was acting on behalf of the Central Government, the fact would be so stated in the agreement, and if the Central Government was performing the particular service, the contract would be entered into by the President of the Union, which is not the case here.

25. Some arguments were addressed to us regarding the meaning of the term "undertaken" in Section 7(d) of the Act, and it was contended by the learned Counsel for the 1st respondent, that when the Central Government had enacted Central Act XXIV of 1946, taking upon themselves the duty of distribution of essential commodities, there could be no fresh undertaking by the State Government, because the initiative had been taken already by the Central Government. Such a limited interpretation of the term "undertaken", does not comment itself to us. In Stroud's Judicial Dictionary the following is the meaning given to the word "undertake".

> "The word "undertake" with reference to a contract under Section 1 House of Commons (Disqualification) Act 1782, means to enter into".

Stroud's Judicial Dictionary Second Edition, Page 2120:

We also find that the word has been the subject of Judicial construction. In *Leck* V. *Epsom Rural District Council* (1922) I.K.B. 383 the question was raised whether the local authority had *undertaken* the work of cleansing cess pools in the District under Section 42 of the Public Health Act of 1875. At page 392 McCardie J. observed thus:

> "By the word "undertook" I understand that they either expressly resolved to do the thing mentioned in the Section or in practice so acted as to show that they had resolved to do it".

We hold that, in passing orders and issuing administrative directions from time to time, in the matter of distribution of yarn inside the State, the State Government was undertaking a service, within the meaning of Section 7(d) of the Representation of the People Act.

26. The learned Counsel for the first respondent, Sri K. Bashyam, urged upon us a final ground that the contract in this case must be deemed to be void for illegality, because of a decision of our High Court in 1952—I.M.L.J. page 514 (*Balakrishnan* v. *State of Madras*), which, according to the learned Counsel's contention held the certain provisions of the Cotton Textile Control Order of 1948 were *ultra vires* of the constitution. The learned Counsel for the petitioner, Sri D. Munikanniah, immediately pointed out to us that a careful perusal of the decision cited, did not

warrant the inference deduced by the opposite side, and we agree with him. Their Lordships opinion in the decision cited, was, that, "if in the exercise of the powers granted under clause 30, the Textile Commissioner has evolved a proper scheme of distribution, which did not offend certain articles (specified) under the Constitution, then there is no room for complaint by any person on the ground that his rights had been unlawfully affected to his prejudice, and that if till now the parties concerned have not evolved any general scheme, it will be open to them to hereafter at least lay down the general principles of distribution." This decision cannot, therefore, be held as laying down that any particular provision of the Textile Control Order, was *ultra vires* of the Constitution.

27. Before we conclude, we have to refer to some of the English decisions cited before us by the learned Counsel, which have a bearing on the general policy implied in providing for the disqualification stated in clause 7(d) of the Act, against persons being chosen for membership of democratic legislative bodies. As pointed out by the learned Counsel for the petitioner, these decisions, based upon various enactments, in England, will not have much bearing when we have got the duty of interpreting and applying the provisions of an enactment like the Representation of the People Act, which differs from previous statutes in several material respects. But the decisions, however, have a value for the light they throw upon the jealousy with which democracy guards the freedom and independence of its elected representatives. The principle, which these decisions emphasise, is that no member of a legislature or a Municipal body, should be elected, if there will be a likelihood of a conflict between his duty and interest. Another principle laid down is that a disqualifying clause in an enactment, should be construed strictly, because it is penal in nature. In 1925—1—Kings Bench Division—*Lapish* v. *Braithwaite*, page 474, at page 485, the Court had to construe a disqualification clause under the Municipal Corporations Act 1882, against a candidate, having a share or interest in a contract or employment with, by, or on behalf of the council, and it observed that "the intention of the legislature in framing that section was to secure, as was thought necessary, that aldermen and councillors should not place themselves in positions in which their duty and their interest conflicted and to remove a possible source of temptation." In *Holden* v. *Southwark Corporation* 1921—I—Chancely Division, page 550, their Lordships applied the local Government Act of 1894, which provided disqualification for membership for a person "concerned in any bargain, or contract, entered into with the council, or who participates in the profit of any such bargain or contract", and held "that such and similar provisions were intended to prevent the members of local Boards, who may have occasion to enter into contract from being exposed to temptation or even to the semblance of temptation, and the object obviously was to prevent the conflict between the interest and duty that might otherwise inevitably arise." These observations were quoted from an earlier decision in 22 Queens Bench Division 747, *Nutton* v. *Wilson*. The decision in 129 English Reports, Page 632, *Thomspon* v. *Pearce*, relied upon by the Counsel for the first respondent, is relevant only for the observation that in construing an act, the first thing to consider is the nature of the Act, whether it be remedial or penal and that the act which disqualified a candidate for the Parliament "if he had interest in a contract with the Commissioners of His Majesty's Treasury, Navy or the Victualling Office, or with the Master General or Board of Ordinances, or with any one of more such commissioners, or with any other person or persons whatsoever, on account of public service, "was surely penal and therefore the Court had to construe it strictly." But the facts of that case were wholly different, and that case has no application here. Even if we have to give due weight to the policy underlying the disqualification, as stated in the decisions cited, that the individual elected should not be exposed to a situation where his duty and interest might conflict, we are of the opinion that it will hold good in the case of the 1st respondent also. It will be unnecessary to catalogue a number of possible situations which might arise, and it will suffice to mention one such situation, for example, when the member elected, may have to vote for the continuance or discontinuance of the State nominee system, it will be an occasion when his duty and interest conflict with each other.

28. Therefore, we find under issue 1, that the 1st respondent, at all relevant times, had interest in a contract for the performance of a service undertaken by the Madras State Government, that he is thereby disqualified under Section 7(d) for being chosen as a member of the State Legislature, and that the acceptance of his nomination by the Returning Officer, was improper.

29. *Issues* 2 to 4.—The learned Counsel for the petitioner urged that it would suffice if we set aside the election of the 1st respondent and declare the candidate, who had got the next largest number of votes, *viz.*, the 3rd respondent, duly elected, and that there is no need for declaring the election wholly void. The reason why the petitioner pressed for the above relief was made plain to us, because, since the

3rd respondent had been subsequently elected to the Council of States, the petitioner expected as the candidate who secured the next largest number of votes after the 3rd respondent, to get himself declared duly elected, by some other authority, and not by us. Under Section 101 of the Representation of the People Act, the Tribunal is empowered to declare the petitioner or some other candidate duly elected, if, in fact, the petitioner or such other candidate received a majority of the valid votes, or, that but for the votes obtained by the returned candidate by corrupt or illegal practices, the petitioner or such other candidate would have obtained the majority of the valid votes—a situation which does not arise in this case. Under Section 100(2), which was also quoted by the learned Counsel for the petitioner, clauses (a) and (b) of that sub-section, have no reference to the case on hand. There was a faint argument before us, by the petitioner's Counsel, relying upon Section 100, 2(c), that the 1st respondent's disqualification fell under Article 191(1) (e) of the Constitution, that this will amount to a non-compliance with the provisions of the Constitution, besides the Representation of the People Act, and, therefore it would suffice for the Tribunal to declare the election of the 1st respondent void, and that the entire election need not be set aside. But in our judgment, this case is governed by Section 100(1)(c), which directly applies, when it is found that the Returning Officer had improperly accepted a nomination, and when by such improper acceptance, the result of the election had been materially affected. In such a case, it is obligatory on the Tribunal, under Section 100(1)(c), to declare the election to be wholly void.

30. Before taking leave of this case we desire to point out that it would be better to have the Representation of People Act, 1951, suitably amended with a view to have questions relating to the validity of nomination papers finally disposed of as far as possible before the holding of the election. Section 100(1) of the Act makes it obligatory on the Tribunal to set aside the election and order a fresh election when there is an improper acceptance or rejection of a nomination paper. The hardship or prejudice caused by such a course was stated in forceful language by Wallace J. in *Sarvothama Rao* v. *Chairman, Municipal Council, Saidapet,* [(1924) I. L. R. 47 Madras 585 at page 600] thus:

> "I am quite clear that any post-election remedy is wholly inadequate..... It is no consolation to tell him that he must let the election go on and then have it set aside by petition, and have a fresh election ordered. The fresh election may be made under altogether different conditions and may bring forward an array of fresh candidates".

The existing rule is sought to be justified for the reason that otherwise there will be inconvenience to the public and the administration by elections being held up. [See *Desi Chettiar* v. *Chinnasami Chettiar* (1928) M.L.J. 162]. In *Ponnusami Chettiar* v. *Returning Officer, Namakkal* [(1952) 1. M.L.J. 775 (S.C.)] the Supreme Court in dealing with Article 329 of the Constitution referred to the above divergent views and also observed "that in England the hardship and inconvenience which may be suffered by an individual candidate has not been regarded as of sufficient weight to induce Parliament to make provisions for immediate relief and the aggrieved candidate has to wait until after the election to challenge the validity of the rejection of his nomination paper"

It may be noted, however, that the Supreme Court in the above case was dealing with the power of the Court to issue writs and did not express any opinion on the merits or demerits of the present system. We are of the opinion that the English model is by no means a sure guide on this point, especially as conditions there are wholly different and election petitions have become very rare in that country. The average Returning Officer in India has not had the training or experience to decide questions relating to the validity of nomination papers, especially when they involve questions of law. There is no reason why Regional Election Tribunals should not be set up even before the stage of holding the elections for the purpose of finally deciding whether the order of the Returning Officer as regards the validity of nomination papers is right or wrong. Such delay as may be caused in a few cases will be more than compensated by the advantages from the point of view of the candidate and the public at large. It should at the same time be possible to make the Section sufficiently elastic so as to empower the Election Tribunal to postpone the decision on the question in a given case till after the election if, in their opinion, it involves a complicated question of fact or law. In the bulk of the cases the above course is likely to give the quietus to disputes regarding the validity of nomination papers. We make the aforesaid suggestion as in quite a number of election petitions the only question raised relates to the legality of the order of the Returning Officer accepting or rejecting the nomination paper.

31. In the result, we declare the election in this case to be wholly void. The first respondent will pay the costs of this petition to the petitioner. The 3rd respondent will bear his own costs. The first respondent will pay Rs. 50 as day costs to the Government Pleader, who attended the hearing on our notice under Section 89. Vakil's fee Rs. 250.

Pronounced in open Court, this, the 4th day of December, 1952.

(Sd.) M. ANANTANARAYANAN, *Chairman.*

(Sd.) P. RAMAKRISHNAN, *Member.*

(Sd.) B. V. VISWANATHA AIYAR, *Member.*

Petitioner's Exhibits:

A-1. 29-6-1950.—The Madras Yarn (Dealers) Control Order, 1948, issued by the Collector of North Arcot, Vellore, to Shanmugar and Co., Gudiyattam (Form B).

A-1(a).—A copy of Exhibit A-1.

A-2. 15-11-1948.—Certified copy of the agreement executed by Cloth and Yarn (Wholesale and Retail) Dealer, Sri Shanmugar and Co., Gudiyattam before the Collector of North Arcot, Vellore.

A-3. 20-1-1950.—A copy of the G.O.Ms. No. 280, of the Government of Madras, Development Department.

A-4. 16-8-1950.—Agreement entered into between His Excellency the Governor of Madras and Sri A. J. Arunachala Mudaliar, the 1st respondent.

A-5. 19-11-1951.—Certified copy of the nomination paper filed by Sri A. J. Arunachala Mudaliar, the first respondent and the order of the Returning Officer passed on 30-11-1951.

A-5(a). 28-11-1951.—Certified copy of the objection petition filed by Sri P. S. Rajagopal Naidu, the third respondent before the Returning Officer, Tirupattur.

A-5(b). 30-11-1951.—Certified copy of the statement of Sri A. J. Arunachala Mudaliar, the first respondent, before the Sub-collector of Tirupattur.

A-6. 13-10-1952.—Notifications by the Government of Madras, regarding the removal of disqualifications of the petitioner published in the Fort St. George Gazette, Part II Extraordinary.

First Respondent's Exhibits

B-1. 24-9-1951.—A copy of the G.O.Ms. No. 4224 of the Government of Madras, Development Department.

B-2. 29-10-1952.—Notifications by Government of Madras, Development Department, regarding the Amendments to Madras Cloth (Dealers) Control Order and Madras Yarn (Dealers) Control Order, published in Supplement to Part II of the Fort St. George Gazette.

(Sd.) M. ANANTANARAYANAN, *Chairman.*

[No. 19/109/52-Elec.III.]

S.R.O. 2072.—WHEREAS the elections of Shri Bhika Trimbak Pawar of Ghoti, Taluka Igatpuri, District Nasik, Shri Dattatraya Tulsiram Kale, of Motha Maharwada, House No. 2983, Nasik City and Shri Pandurang Mahadeo Murkute of Sharada Sadan, Goli Colony, Nasik City, as members of the Legislative Assembly of Bombay from the Nasik-Igatpuri constituency of that Assembly, have been called in question by an election petition duly presented under Part VI of the Representation of the People Act, 1951 (XLIII of 1951), by Shri Suryaji Ramrao Bamble of Taked Budruk, Taluka Igatpuri, District, Nasik, Bombay;

AND WHEREAS the Election Tribunal appointed by the Election Commission, in pursuance of the provisions of section 86 of the said Act, for the trial of the said Election Petition, has, in pursuance of the provisions contained in section 103 of the said Act, sent a copy of its order to the Commission;

NOW, THEREFORE, in pursuance of the provisions of section 106 of the said Act the Election Commission hereby publishes the said Order of the Tribunal

ELECTION PETITION NO. 217 OF 1952

CORAM :

Shri V. A. Naik, B.A. (Hons.) LL.B. — *Chairman.*
Shri R. R. Karnik, B.A. (Hons.) LL.B. } *Members.*
Shri L. P. Pendse, B.A. LL.B. }

In the matter of the Representation of the People Act, 1951 and the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951.

and

In the matter of the Election to the Bombay Legislative Assembly from the Nasik Igatpuri Constituency.

and

In the matter of Election of Bhika Trimbak Pawar.

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(1) Shri Suryaji Ramrao Bamble, an inhabitant of Taked Budruk, Taluka Igatpuri, District Nasik.—*Petitioner.*

Versus

(1) Shri Bhika Trimbak Pawar, inhabitant of Ghoti, C/o Mulchand Shreemal Gothi, residing at Ghoti, Taluka Igatpuri, District Nasik.

(2) Shri Balkrishna Rajaram Shukla, residing at 1577, Somvar Peth, Nasik City.

(3) Shri Shreemal Balkrishna Gosavi, residing at 921-A, Kapad Bazar, Nasik City.

(4) Shri Gotiram Bayaji Kokani residing at Ladakabai Arogya Bhuwan 4613, Panchawati, Nasik City.

(5) Shri Anantrao Ramrao Bamble, Taked Budruk Taluka Igatpuri, District Nasik.

(6) Shri Dattatraya Tulsiram Kale, Motha Maharwada, House No. 2983, Nasik, City.

(7) Shri Krishnarao Gangaram Gangurde, House No. 101, Shiwaji Nagar, Poona 5.

(8) Shri Bhaurao Krishnarao Gaikwad, Kismat Bag, Nasik City.

(9) Shri Pandurang Mahadeo Murkute, Sharada Sadan, Gole Colony, Nasik City.

(10) Shri Navroji Dhanaji Patel, 1151, Main Road, Nasik City.

(11) Shri Laxman Thakuji Khetade, House No. 4615, Jyanu Wadi, Peth Road, Panchawati, Nasik City.

(12) Shri Sayaji Chimaji Khade, Goreram Galli, House No. 866, Nasik City.

(13) Shri Kisan Kachardas Rathi, House No. 559, Raviwar Peth, Nasik City.

(14) Shri Madhav Purushottam Limaye, Tarkhadkar Bungalow, Gole Colony, Nasik City.

(15) Shri Sakroo Dagadu Wagh, Alvand, Post Kavnai, Taluka Igatpuri, District Nasik.

(16) Shri Tulsiram Sambhaji Kale, Motha Maharwada, House No. 2983, Nasik City.

(17) Shri Punjaji Laxman Gowardhane, Sanjegaon, Post Kavnai, Taluka Igatpuri, District Nasik.

(18) Shri Vithal Ganpat Handge, House No. 526-A New Tambat Galli, Raviwar Peth, Nasik City.

(19) Shri Maruthi Bhawanrao Morve, 29, Govindji Keni Road, Room No. 32, Naigaon, Bombay 14.

(20) Shri Ganpat Dhondiba Bendkoli, Tarkhadkar Bungalow, Gole Colony, Agra Road, Nasik City.

(21) Shri Govind Hari Deshpande, Kanade Maruti Galli House No. 1538, Nasik City.

(22) Shri Karbhari Rambhaji Wagh, Shri Udaji Maratha Boarding, Nasik City.

(23) Shri Ramchandra Namdeo Bhangare, Shinde, Taluka Nasik. District Nasik.

(24) Shri Deoram Sayaji Wagh, 479-J, Gharpure Ghat, Nasik City.—*Respondents.* (Nos. 1 to 24).

JUDGMENT. (Per Shri V. A. Naik, Chairman).

This is a petition under Section 81 of the Representation of the People Act, 1951, for a declaration that the election to the Bombay Legislative Assembly from the Nasik-Igatpuri Constituency held on 3rd January 1952 is wholly void; in the alternative for a declaration that the election of Respondent No. 1 is void. The material facts may be briefly stated as follows:

The election to the Bombay Legislative Assembly from the Nasik-Igatpuri Constituency took place on the 3rd January 1952. There are three seats assigned to this constituency, one reserved for scheduled castes, one reserved for the scheduled tribes and the third general. The petitioner had filed his nomination paper for a seat reserved for the scheduled tribes. Similarly Bhika Trimbak Pawar, respondent No. 1, had also filed his nomination paper for the same seat. The petitioner was contesting the election as a Congress candidate whereas respondent No. 1 was contesting as a Socialist party candidate. The nomination of the petitioner was rejected by the Returning Officer for certain reasons which need not be stated here as they are not material for the purposes of this petition.

In his nomination paper Bhika Trimbak Pawar had chosen as his symbols a tree, a ladder and a pair of scales his first preference being for a symbol of tree. At the time of the election however the Returning Officer assigned the symbol of a pair of bullocks to Bhika Trimbak Pawar. The symbol of a pair of bullocks was reserved for the nominees of the Congress party. The petitioner contends that the action of the Returning Officer in assigning a symbol other than the one or ones chosen by the candidate in his nomination paper is illegal. He further contends that the result of the election has been materially affected as a result of this improper assignment of the symbol of a pair of bullocks to respondent No. 1. This is the first ground on which the election of respondent No. 1 is attacked.

The second ground on which it is attacked is that respondent No. 1 had not completed the age of 25 years at the date of his nomination and therefore was not qualified for being chosen to fill a seat in the Bombay Legislative Assembly. According to the petitioner, Bhika Trimbak Pawar was born in December 1928. The petitioner alleges that he came to know about the correct age of the first respondent sometime in March 1952. This averment is made presumably with a view to explain the failure on his part to object to the nomination of respondent No. 1 on the ground of age. The petitioner, therefore contends that the nomination of respondent No. 1 was illegally accepted. He also avers that the improper and illegal acceptance of the nomination of respondent No. 1 has materially affected the result of the election for the Nasik-Igatpuri Constituency. He therefore PRAYS that the election to the Bombay Legislative Assembly from the Nasik-Igatpuri Constituency be declared null and void; in the alternative he prays that the election of respondent No. 1 be declared null and void.

2. Respondents Nos. 1 and 6 were elected to the seats reserved for scheduled tribes and scheduled castes respectively. Respondent No. 9 was elected to the general seat. The other respondents are defeated candidates. The contesting respondents are respondents Nos. 1, 6 and 9.

3. Respondent No. 1 put in his written statement at Ex. 46. He denies that the action of the Returning Officer in assigning the symbol of a pair of bullocks to him was illegal or improper. He further denies that the result of the election has been materially affected as a result of the assignment of the said symbol to him. He asserts that he had completed his 25th year before the date of his nomination. He therefore contends that his nomination was perfectly valid and was rightly accepted by the Returning Officer.

4. Respondent No. 6 put in his written statement at Ex. 55. He supports the contentions of respondent No. 1. At paragraph 5 he gave the date of the birth and the date of vaccination of respondent No. 1 as 24th July, 1926 and 18th January, 1927 respectively. He also contends that the petitioner cannot claim for setting aside the entire election; at best he can ask for setting aside the election of respondent No. 1. He further contends that the petition is not in time. Respondent No. 9 by his written statement Ex. 47 raises contentions similar to those of Respondent No. 6.

5. It is not necessary to set out the contentions of the other respondents because some of them support the petitioner and some say that they are not interested in the petition.

6. Issues were framed at Ex. 67 as follows:—

(1) Is the decision of the Returning Officer in assigning any particular symbol to a candidate liable to be called in question in an election petition?

(2) Does the petitioner prove that the symbol of a pair of bullocks was improperly assigned by the Returning Officer to respondent No. 1?

(3) If so, has the use of that symbol by Respondent No. 1 materially affected the result of the election?

(4) Does the petitioner prove that respondent No. 1 was under 25 years of age on the date of the nomination paper i.e., 24th November 1951?

(5) If the election of respondent No. 1 is set aside on any of the grounds above, is the entire election liable to be set aside?

(6) If not, to what extent?

(7) Is not the petition in time?

(8) If it is not in time, has the Tribunal jurisdiction to decide the question of limitation?

(9) What order?

Our findings are:—

(1) Finding not necessary.

(2) No.

(3) Finding not necessary.

(4) No.

(5) ⎫
(6) ⎭ Finding not necessary.

(7) It is in time.

(8) The Tribunal has jurisdiction.

(9) As below.

7. The principal issue is the case is Issue No. 4. We propose to discuss that issue first because it goes to the very root of the case. The petitioner alleges that respondent No. 1 was under 25 years of age at the date of his nomination, that is 24th November, 1951. In support of this contention reliance is placed on the document styled as the certificate of age (Ex. 115). Trimbaka Chima Pawar, the father of respondent No. 1, put his son respondent No. 1 into the primary school No. 1 under the Nasik Municipality on 19th March, 1934. Trimbaka Chima Pawar is illiterate. It is necessary for the father or the guardian to give a certificate regarding the age of the pupil at the time of his admission in the primary school. There is a printed form for this certificate. The certificate of age at Ex. 115 bears the thumb mark of Trimbaka Chima. In this document Trimbaka Chima has made a declaration to the effect that his son Bhika was born on 8th December 1928, at Nasik. At the back of the document are noted the answers given by Trimbaka Chima Pawar to five queries put to him below which his thumb mark is taken. In his replies to questions Trimbaka stated that the boy was being put in the school for the first time, that no note has been made regarding the date of his birth, that the date mentioned by him in the declaration was correct, that the boy was vaccinated and that he rightly understood the substance of the rules. This document is the sheet anchor of the petitioner's case.

8. Krishnaji Vinayak Jamkhedkar was the Head Master when Bhika Trimbaka Pawar was admitted into the Primary School No. 1. Krishnaji Vinayak Jamkhedkar, the then Head Master, has not been examined for the petitioner. Ramchandra Narayan Shimpi, the present Head Master of the primary school, was summoned for the petitioner to produce the bound book containing the age certificates, the register called the General Register relating to the admission of boys in the school and their having left the school. At the time of the admission the date of birth of the boy is entered in the general register. This date is taken from the certificate of age issued by the father or the guardian. The date of birth is also mentioned in the School Leaving Certificate. This date is taken from the entry

in the register known as the General Register. It will thus be seen that the certificate of age is given by the father or the guardian forms the basis of the entry regarding the date of birth made in the General Register as also the School Leaving Certificate.

9. It appears from Ex. 113 (the leaving certificate) that Bhika Trimbaka Pawar left the primary school on 5th August 1941, for joining the Panchavati School. There is no evidence as to whether Bhika Trimbaka Pawar joined the Panchavati School It however appears from the evidence of Madhukar Vinayak Ketkar clerk in the Pethe High School, that Bhika joined the Pethe High School on 3rd July, 1943, from the Central School, which is also a primary school under Nasik Municipality. The School Leaving Certificate issued by the Municipal Central School, Nasik, is produced at Ex. 86. This certificate also mentions the date of his birth as 8th December, 1928. Bhika was a student in the Pethe High School from 3rd July, 1943 to 31st May, 1947. It appears that he appeared for the matriculation examination in 1947 and failed. Thereafter he joined the Rungta High School. The School Leaving Certificate issued by the Pethe High School, which was produced by Bhika in the Rungta High School is at Ex. 98. This certificate also mentions the date of birth of Bhika as 8th December, 1928. It appears that Bhika again appeared for matriculation in 1948, that time from the Rungta High School. It is necessary for the candidate appearing for matriculation to mention the date of his birth in the application. It appears from the evidence of Vinayak Raghunath Darshetkar, Head Clerk, Bombay University, that Bhika had mentioned the date of his birth in his application as 8th December 1928. The certificate issued by the Registrar regarding the date of birth of Bhika (Ex. 83) also mentions the same date as the date of his birth. These are the other documents which are sought to be relied upon by the petitioner. But it is evident that the entries regarding the date of birth of Bhika Trimbaka Pawar in all these documents are based upon the entry in the register maintained in the primary school No. 1 which in its turn is based on the certificate of age issued by Trimbaka Chima Pawar (Ex. 115).

The primary evidence, therefore, is the declaration made by Trimbaka Chima Pawar on 19th January, 1934 regarding the date of birth of his son Bhika Trimbaka Pawar. The main point for our consideration, therefore, is what is the probative value of this declaration and whether the date mentioned therein is accurate.

10. As pointed out above, Krishnaji Vinayak Jamkhedkar, the then Head Master, who admitted the boy into the school, has not been examined. That being the case, we have to depend upon the evidence of Trimbaka Chima and the contents of the declaration itself for the purpose of finding out as to how the date put in the certificate was arrived at. Ramchandra Narayan (Ex. 109) the present Head Master of the school, has deposed to the practice that is followed when a guardian brings a pupil to the school for admission. That practice in broad outlines is as follows: (1) The Head Master in the first instance asks for some contemporaneous record regarding the date of birth, such as a horoscope or a memorandum or an extract from the birth register. When such record is produced a note is made at the back of the certificate and the entry is based thereon. (2) When no such record is produced by the guardian, questions are asked to him with a view to elicit information for fixing the approximate date of birth. (3) If the guardian happens to be illiterate questions are asked as to how many days before or after an important holiday the child was born and the date of birth is fixed with reference to replies given.

11. It is thus evident that the date so fixed by the teacher from the oral answers given by an illiterate man is bound to be approximate. There is no accuracy or exactitude about it. The evidence given by Trimbak Chima and the replies to the questions put, as noted at the back of Ex. 115 show that the usual questions were put to Trimbaka and answers elicited from him and from these answers an attempt was made to fix the date of birth. Trimbaka states that he told the teacher that Bhika was born somewhere near Dasara or Divali. The thumb mark of Trimbaka has been endorsed by one Punjaji Ganpat Vyawahare. There is no evidence to show who this Punjaji Ganpat Vyawahare was. Trimbaka asserts that he did not know any person by name Punjaji Ganpat Vyawahare. It is thus clear that Trimbaka alone had gone to the school with his son Bhika. It is also clear that the date of birth mentioned in the certificate of age (Ex. 115) was derived by the teacher on the information elicited from an illiterate man.

12. It was conceded by Mr. Gorwadkar for the petitioner that some margin for error is allowable for the date arrived at by this process. At the same time he argued that it is not possible that that margin would be as wide as a period of two years. This argument is not without force. But the margin of error would always depend upon the intelligence and the capacity of the guardian who is

supplying information from his memory. Once it is conceded that there is room for mistake the question as to whether the margin of error is narrow or wide is only a matter of speculation. Trimbaka Chima did not strike us as an intelligent man. Looking to his capacity it is not impossible that he would extend or cramp the period by one or two years.

13. As against this solitary and unreliable piece of evidence we have got evidence of more reliable character in the shape of extracts from the birth register and vaccination register. Ex. 129 is an extract from the birth register which shows that a son was born to one Trimbaka Chima on 24th July, 1926. According to respondent No. 1, this entry in the birth register relates to respondent No. 1 The name of the boy is not mentioned nor the surname. The place of residence of Trimbaka Chima is shown as "near Gharpura Maharwada". In the column relating to caste the word "Marathi" was originally written On 23rd June, 1952, that is to say after the receipt of notice of the present petition, respondent No. 1 swore an affidavit (Ex. 167) before the City Magistrate stating that in the birth register his caste is wrongly shown as Marathi and that his real caste is Mahadev Koli and he has been elected from a seat reserved for the scheduled tribes. Being armed with this affidavit, on 30th June, 1952, he gave an application to the municipality for correcting that entry (Ex. 168). A meeting of the Standing Committee of the municipality was called to consider this question and the Standing Committee passed a resolution on 17th July, 1952, to the effect that the word "Marathi" should be struck off and in its place the words "Mahadev Koli" should be substituted. Later on the entry was corrected in pursuance of this resolution.

14. Mr. Gadgil for respondent No. 1 drew our attention to the provisions of Section 28 of the Birth and Death Registration Act (No. VI of 1886) and argued that it is quite legitimate to ask for the correction of mistake occurring in the entry. It is true that under Section 28 it is open to a party to ask for the correction of an entry or of any particular contained therein. At the same time it cannot be forgotten that the application for correction was made after the receipt of this petition. From the affidavit it appears that the object in seeking the correction was to re-affirm that respondent No. 1 came from a scheduled tribe. Mahadev Koli is one of the scheduled tribes, but not Marathi. Mr. Gorwadkar for the petitioner suggested that the main purpose which inspired respondent No. 1 in seeking the correction was to connect the entry with him and thus get over the difficulty that he was below 25 years at the time of his nomination. Whatever may be the object of respondent No. 1, the fact remains that that the alteration was got effected after the receipt of notice of this petition in which the age of respondent No. 1 is the principal bone of contention. That being the case, no importance can be attached to this correction. We must therefore read the entry as it stood before its correction.

15. The question therefore is whether this entry relates to the birth of respondent No. 1 Admittedly Trimbaka Chima does not belong to the caste Maratha or Marathi. Mr. Gadgil pointed out that there is no caste called Marathi. It is true that there is no such caste as Marathi. There is a caste known as Maratha. In our opinion no argument can be based upon this terminological inexactitude as in ordinary parlance the words Marátha and Marathi connote the same thing. If that is so, the description of caste mentioned in the entry does not apply to Trimbaka Chima, the father of respondent No. 1. At the same time it is possible to imagine that there was a misdescription with regard to the caste and if there are other means of connecting the entry with respondent No. 1, or, at any rate, a son of his father Trimbaka Chima, the misdescription can be ignored.

16. In this connection the description of the place of residence as contained in the entry has some importance. Trimbaka Chima is shown to be living in the vicinity of Gharpure Maharwada. It is the case for respondent No. 1 that Trimbaka Chima was residing in the Sawarkar Wada in Aditwar Peth at the time of respondent No. 1's birth that is in 1926. It is undisputed that the house known as Sawarkar Wada is situated in Lonar Galli. The municipal house Number of Sawarkar Wada is 532. Shankar Vinayák Lele, a clerk in Nasik Municipality has stated that the Maharwada known as the Gharpure Maharwada lies at a distance of about 25 feet from the Sawarkar Wada. He further states that the police gate known as Malhar Gate Chawky is at a distance of 150 feet from the said Wada.

17. If it is established that Trimbaka Chima was residing in the Sawarkar Wada in 1926 the description contained in the birth register about the place of residence being near Gharpure Maharwada may apply to him unless it is shown that there was another Trimbaka Chima living nearby. In that connection reliance is placed upon the printed voters' list (Ex. 159), for the year 1926. At serial No. 20 the name Trimbaka Chima Koli is entered and the place or residence is shown as

Sawarkar Wada. Mr. Gorwadkar argued that the printed list was not admissible in evidence because it was neither the original nor its certified copy. Under Explanation II of Section 62 of the Indian Evidence Act where a number of documents are all made by one uniform process such as printing each is primary evidence of the contents of the rest. The printed list of voters answers this description and therefore in our opinion is primary evidence. Assuming it is not primary evidence it can be admitted in evidence as secondary evidence under Section 63(2) of the Indian Evidence Act because it is a copy prepared by mechanical process which in itself ensures its accuracy. Mr. Gorwadkar argued that Trimbaka Chima did not assert in the witness box that he was a voter in 1926 and that the name appearing in the list pertained to him. He further argued that inasmuch as Trimbaka Chima is not shown to be a tax payer to the Municipality it is impossible to imagine that his name would be entered in the voters' list. He suggested that Trimbaka Chima whose name appears in the voters' list at serial No. 20 must be a different individual. It has however to be remembered that in the voters' list the place of residence of Trimbaka Chima is shown as Sawarkar Wada. It was never suggested in the cross-examination either of Trimbaka Chima or of Krishnaji Vishnu Sawarkar (to whose evidence reference will be made shortly) that there was any other person residing in the Sawarkar Wada by name Trimbaka Chima. In fact the whole attempt was to show that Trimbaka Chima, the father of respondent No. 1, was not residing in the Sawarkar Wada. No material is placed before us to show as to what kind or what amount of tax was required to be paid for being eligible to be voter to the municipality. Assuming for a moment that Trimbaka Chima did not possess the necessary qualification at best it would mean that his name was wrongly entered. If there is evidence to show that Trimbaka Chima, the father of respondent No. 1, was residing in the house known as Sawarkar Wada, as long as it is not shown that there was another Trimbaka Chima residing in that wada in 1926, it must be presumed that the name in the voter's list (Ex. 150) at serial No. 20 corresponds to Trimbaka Chima, the father of respondent No. 1.

18. We would therefore deal with the question as to whether Trimbaka Chima, the father of respondent No. 1, was actually residing in the Sawarkar Wada in the year 1926. In that connection we have the evidence of Krishnaji Vishnu Sawarkar at Ex. 160. The building known as Sawarkar Wada comprising of two Municipal numbers 501 and 532 belonged to Sishnu Dhondo Sawarkar and his cousin brother Mahadev Govind Sawarkar in the year 1926. Vishnu Dhondo Sawarkar died in 1938. Mahadev Govind Sawarkar is also dead. His son is alive but has not been examined by either party. It appears that a partition took place between Vishnu Dhondo Sawarkar and Mahadev Govind Sawarkar in 1927. In this partition the entire portion comprising of Municipal No. 501 and a part of the portion comprising of municipal No. 532 went to the share of Mahadev Govind Sawarkar and the remaining part of Municipal No. 532 went to the share of Vishnu Dhondo Sawarkar. It appears that prior to this partition the two owners were separate and were recovering rents from separate tenants. Krishnaji Vishnu has produced account books maintained by his father. They are from 1924 to 1938 in two separate books marked as Exs. 162 and 163. There is no entry in these books relating to the payment of rent by Trimbaka Chima upto December 1927. Mr. Gorwadkar therefore argued that there is no evidence to show that Trimbaka Chima was a tenant residing in the Sawarkar Wada before 1927. Unfortunately the son of Mahadev Govind Sawarkar has not been examined. We do not know if Mahadev Govind used to maintain any accounts regarding the rents recovered by him. It is possible that he was recovering rent from Trimbaka Chima prior to the partition and this may account for the absence of an entry in the accounts of Vishnu Dhondo Sawarkar prior to December 1927. But Krishnaji Vishnu Sawarkar has positively asserted that Trimbaka Chima Pawar was residing in the Sawarkar Wada as a tenant from 1918 or 1919 onwards. There is no reason why Krishnaji Vishnu Sawarkar, who is a teacher in a High School, should come forward to tell a lie on behalf of respondent No. 1. It is argued that Krishnaji Vishnu Sawarkar was a young boy in 1918 or 1919 and that he was residing in a separate house as he was a motherless child and was being brought up by his grandmother Jiji Cadre. At the same time Krishnaji Vishnu Sawarkar has told us that he used to go to Sawarkar Wada often to meet his father who was residing there. Believing his evidence and that of Trimbaka Chima we hold that in 1926 Trimbaka Chima was residing in the Sawarkar Wada. If that is so, then the description regarding the place of residence of Trimbaka Chima as given in the birth extract corresponds to Sawarkar Wada and therefore it is most likely that Trimbaka Chima mentioned in the entry in the birth register as having begotten a son on 24th July 1926 is the same as the father of respondent No. 1.

19. The evidence of Trimbaka Chima Pawar supports the conclusion that the extract of birth at Ex. 129 refers to respondent No. 1 Trimbaka states that he had

five sons and four daughters. He has given the chronological order of his children which is as follows: (1) Kashinath, (2) Yamuna, (3) Reu, (4) Sonubai, (5) Hanmanta, (6) Bhika, (7) Deoram, (8) Shakuntala, (9) Sukdev. The eldest son Kashinath died about 7/8 years back. He has left behind him three children. Yamuna died when she was a child of about a year. Reu also died when she was 5 or 6 months' old. Sonubai is alive and has one son and three daughters. Hanmanta died 5 or 6 months after his birth. The death extract of Hanmanta has been produced at Ex. 132. Hanmanta is shown to be two years old at his death in the death extract Ex. 132). That means Hanmanta was born in 1924. The extract of birth (Ex. 131) shows that on 10th April 1924 a son was born to Trimbaka Chima, residing in Lonar Galli. There can be no doubt that this extract relates to Hanmanta. According to Trimbaka, the spacing between the births of two children was roughly of 2 years. He states that Bhika, respondent No. 1, is next to Hanmanta, born after about 2 years. His next issue is Devram. The extract from the birth register at Ex. 133 shows that a son was born to Trimbaka Chima on 29th July 1928. According to respondent No. 1, this extract relates to Devram. The place of residence of Trimbaka Chima is shown as "behind Malhar Gate". We have before us the extracts of three sons born to Trimbaka Chima Koli one after the other. The dates of birth of these sons are as follows: 10th April 1924, 24th July 1926 and 29th July 1928. Unfortunately the names are not mentioned and that has given rise to the present controversy. But there can be no doubt that Trimbaka Chima Koli to whom the three sons were borne in succession is no other than the father of respondent No. 1. It is thus clear that he had three sons, one born in 1924, the other born in 1926 and the third in 1928. The name of the son born in 1924 was Hanmanta and that Hanmanta is dead. Both of his sons born in 1926 and 1928 are alive. It is clear that Devram is younger than Bhika, respondent No. 1. If that is so it follows that Bhika was born in 1926 and Devram in 1928.

20. According to the certificate of age given by Trimbaka (Ex. 115) Bhika was born on 8th December, 1928. On this day no son was born to Trimbaka Chima at all. One son was born to Trimbaka Chima on 29th July 1928, (Ex. 133). It is therefore physically impossible that a son would be born to him five months later, that is in December 1928, unless it is assumed that Trimbaka had two wives. It was faintly suggested that Trimbaka married twice, firstly with the daughter of one Laxman Nadekar and secondly a girl from Bamble family. This is stoutly denied by Trimbaka. As it is, the suggestion was that Trimbaka married the present wife after the death of his first wife. It is nobody's case that he had two wives at the same time. No attempt has been made to show that Trimbaka married twice. It is thus evident that the date 8th December 1928, is an imaginary one and therefore goes out the picture. The competition is between the two dates, namely 24th July, 1926 and 18th December, 1928. When the second goes out of account, the first must hold the field.

21. An attempt has been made to show that there were other persons, or at any rate another person, bearing the same name Trimbaka Chima Koli. For that purpose several extracts from the birth and death register have been produced. Those extracts are at Exs. 144 to 147. Ex. 144 shows that a girl called Sundri daughter of Trimbaka Koli residing in a house near Dangarutara died on 20th August, 1924. It was suggested to Trimbaka that he had a daughter by name Sundri who was born in 1924 and died within a short time. He has denied that suggestion. It is not shown that Trimbaka Chima was residing at any time nearabout Dangar Utara. It is therefore evident that Trimbaka Koli mentioned in Ex. 144 is a different individual. Ex. 145 shows that a person called Tukaram Trimbaka died on 14th January, 1925, in the leper asylum. Ex. 146 shows that a child was born to Trimbaka Koli in the Mission Hospital but that it was still born. Ex. 147 shows that a daughter was born to Trimbaka Chima Koli on 18th February, 1921. This Trimbaka Chima is shown to reside in a house near Aditwar Maharwada. It is therefore possible to imagine that this extract relates to one of the daughters of Trimbaka Chima, the father of respondent No. 1. It was also attempted to be shown that a person called Kashinath Trimbaka Pawar belonging to Maratha community, who is a teacher in the Maratha Boarding, is alive. But in our opinion all these efforts to show that there was another Trimbaka Chima belonging to the Koli caste are futile because the places of residence do not tally with that of Trimbaka Chima, the father of respondent No. 1, and also because of the order of succession of the issues born to Trimbaka Chima.

22. The matter does not rest here. We have before us the two Vaccination Registers at Exs. 126 and 127. The entry dated 18th January 1927 in Ex. 126 shows that Bhika, the son of Trimbaka Chima Koli was vaccinated on 18th January 1927 and at that time he was four months old. The place of residence of Trimbaka Chima is shown as Sawarkar Wada, House No. 532, Lonar Galli. The extract of the

entry is at Ex. 130. The entry dated 2nd March 1930 in Ex. 127 shows that Devram, the son of Trimbaka Chima Pawar aged 1½ years was vaccinated on 2nd March 1930. The place of residence of Trimbaka Chima Pawar is shown as Sawarkar Wada, House No. 532, Ravivar Peth. The extract of this entry is at Ex. 134.

23. It was argued by Mr. Gorwadkar that the entries in the vaccination register are not admissible in evidence because the vaccination Act (Bombay Act I of 1892) was not in force in Nasik City in 1927 or 1930 and therefore the registers could not be said to be maintained under any law in force. The Vaccination Act was applied to the City of Nasik on 23rd June, 1931. At the same time it is in evidence that the vaccination Department was functioning in Nasik since long prior to the extension of the Vaccination Act. The Vaccination Department was functioning under the auspices of the Public Health Department. That being the case, the entry made in the Vaccination Register becomes admissible in evidence under Section 35(part 1) of the Indian Evidence Act. Section 35 runs as follows:

> "An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact."

The Section falls into two parts. Under the first part it is sufficient if there is a public or an official register and the entry is made by a public servant in the discharge of his official duty. The second part contemplates the case of an entry being made by a person other than a public servant and in that case the Section provides that the entry must be made by such person "in performance of a duty specially enjoined by the law of the country". Mr. Gorwadkar argued that the words "in performance of a duty specially enjoyed by the law of the country" govern the entire Section. We are unable to accept this argument as it is opposed to the plain and gramatical construction of the words used in the Section. The entries in question have been proved by the evidence of Shankar Chintaman Fatak (Ex. 125). Shankar Chintaman Fatak was serving as an Inspector of Sanitation and Vaccination from 1926 to 1930. The relevant entries were made by Madhav Ganesh Jadhav who was a vaccinator for Nasik City from 1926 to 1930. Shankar Chintaman Fatak states that he knew the handwriting of Madhav Ganesh Jadhav because he had seen him write on several occasions and also because he used to receive correspondence from him in the course of official routine. The evidence of Shankar Chintaman Fatak remains unshaken despite severe and exhaustive cross-examination by Mr. Gorwadkar. The entries therefore must be taken to have been properly proved. The entry in a vaccination register has great evidentiary value so far as the age of a boy or girl vaccinated is concerned. Further these entries support and corroborate the entries in the birth registers relating to Bhika (respondent No. 1) and his younger brother Devram. We do not think that it is possible to adduce any more convincing evidence on the point of age than that led for respondent No. 1.

24. It was argued by Mr. Gorwadkar that respondent No. 1 was all along maintaining that the date of birth mentioned in the age certificate (Ex. 115) was correct as becomes clear from the fact that he mentioned that very date in his application for permission to appear for the matriculation examination. In our opinion, the belief of respondent No. 1 about his age or the date of birth has no relevance whatsoever. Respondent No. 1 could possibly have no personal knowledge regarding his age, much less the date of his birth. He had no reason to think that the date of birth mentioned by his father in the age certificate was in any way wrong. There was no occasion nor was there any necessity for him to ascertain the date of his birth before the filing of the present petition in which his age was callenged for the first time. Mr. Gorwadkar also pointed out that the voters' list (Ex. 153) also mentions the age of respondent No. 1 as 24. The age mentioned in the voters' list has no probative value whatsoever. It is further significant to note that neither the petitioner nor the other rival candidate raised an objection at the time of the scrutiny of the nomination on the score that respondent No. 1 was below 25 years. The petitioner has stated in his petition that he came to know about the disability of respondent No. 1 sometime in March 1952. He has not stepped into the witness box to explain under what circumstances and from whom he came to know about the correct age of the first respondent. To our minds it is obvious that the petitioner after having learnt that respondent No. 1 would be below 25 years at the time of the nomination according to the date of birth mentioned in the school registers has rushed to the tribunal with a prayer for setting aside the election and is trying to make what use he can of the entries in the school registers about his date of birth. Evidently he has embarked upon a roving enquiry, taking a negative stand all along and challenging every document produced for the first respondent.

25. That brings us to the consideration of Issues Nos. 1 to 3 which can be discussed together as they relate to the same topic. It appears from the evidence that the first respondent was a candidate of the Socialist party when he put in his nomination paper. Respondent No. 1 denies that he was adopted by the Socialist party or that he had proposed to contest the election under the auspices of the Socialist party. Ex. 141 is an application submitted by the first respondent to the Socialist party for a party ticket. The further fact that respondent No. 1 had expressed his first preference for the symbol of tree, which was assigned to the Socialist party, indicates that he was set up by the Socialist party. It appears that before the date of the scrutiny respondent No. 1 decided to join the Congress party after deserting the ranks of the Socialist party. The petitioner, who was the authorised Congress candidate, was out of the field, his nomination having been rejected. There was therefore no official candidate of the Congress party for the seat reserved for scheduled tribes. Therefore, it appears that the President of the Maharashtra Pradesh Congress Committee decided to adopt respondent No. 1 as the authorised Congress candidate. This is clear from the document Exs. 137, 137A, 137B and 136. On 27th November, 1951 Shri B. S. Hire, who was the then President of the Maharashtra Pradesh Congress Committee (now Honourable Shri Hire), wrote a letter to the Collector informing the latter that the names of the authorised Congress candidates were sent by him on a separate paper and requesting for the assignment of the authorised symbol to those candidates (Ex. 137). Ex. 137A is the list of the authorised candidates. There is a note at the foot of the paper to the following effect: "The name of the authorised candidate for the seat reserved for the scheduled tribes for the Nasik-Igatpuri Constituency would be informed by the District Congress Committee". On 30th November, 1951, the date of the scrutiny, Shri G. H. Deshpande, as the President of the District Congress Committee, wrote a letter to the Collector stating that Bhika Trimbaka Pawar was their authorised candidate for the seat reserved for the scheduled tribes for the Nasik-Igatpuri Constituency and requesting for assigning him the authorised Congress symbol (Ex. 137B). The same day the first respondent also put in an application to the Collector stating that he was the authorised Congress party candidate and requesting that he should be assigned the authorised symbol of the Congress party. It was in pursuance of the letters Exs. 137 and 137B that the Collector assigned the symbol of the Congress party, namely '2 bullocks with a yoke' to the first respondent. The certified copy of the order is at Ex. 138. In that order the Collector has stated that he was assigning the symbol of the Congress party to the first respondent by reason of the fact that he has joined the Congress party and the Congress have adopted him as their authorised candidate.

26. Mr. Gorwadkar contends that the Returning Officer was wrong in assigning a symbol to the first respondent other than the one which he had chosen in his nomination paper. In order to appreciate this contention it is necessary to refer to the rules styled as the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951. Rule 5 relates to "declaration as to symbol to accompany nomination paper". Sub-rule (1) provides that the Election Commission shall publish in due course a list of symbols by a notification in the official Gazette. The list of symbols as published by the Election Commission in the notifications from time to time is at page 267 of the Manual of Election Law, published by Government of India, Ministry of Law (hereafter to be styled as the manual). Sub-rule (2) of rule 5 lays down that every nomination paper "shall be accompanied by a declaration in writing specifying the particular symbol which the candidate has chosen for his first preference out of the list of symbols.....and also specifying two other symbols out of that list which he has chosen for his second and third preferences respectively". The proviso to this Rule is important and runs as follows:

> "Provided that the choice to be made by a candidate under this sub-rule shall be subject to such restrictions as the Election Commission may think fit to impose in that behalf"

In pursuance of the provisions of sub-rule (2) respondent No. 1 in his nomination paper expressed his first preference for the "tree" and his second and third preference for "ladder" and "scales" respectively. Rule No. 10 relates to the preparation and publication of the list of valid nominations. The relevant provision runs as follows:

> "... ..the Returning Officer shall.....consider the choice as respects symbols express by the candidates in the declarations referred to in sub-rule (2) of rule 5 delivered by them along with their nomination papers, and shall, subject to any *general or special directions* issued in this behalf by the Election Commission, assign a different symbol to each candidate in conformity *as far as practicable with his choice.*

If more candidates than one indicate their preference for the same symbol, the Returning Officer shall decide by lot to which of those candidates the symbol will be assigned. The decision of the Returning Officer in assigning any symbol to a candidate under this sub-rule shall be final".

Mr. Gorwadkar referred to the notification issued by the Election Commission on 8th September, 1951 appearing at page 267 of the Manual which runs as follows:

"In exercise of the powers conferred by the proviso to sub-rule (2) of the said rule, the Election Commission hereby directs that no candidate shall choose except with the permission of the Returning Officer (1) any of the symbols specified in items 1 to 14, of the above list; or (2).....

Mr. Gorwadkar argued that the first respondent had already chosen (with the permission of the Returning Officer) the symbol of a tree by showing his first preference to that symbol. He therefore contended that the Returning Officer had no discretion left but to allot the symbol of a tree to him which he had already chosen. We are unable to accept this argument. The list of symbols for the Bombay State Legislative Assembly Elections is to be found at page 13 of the file marked as '8' in the Election paper under the signature of the Returning Officer, Nasik-Igatpuri Assembly Constituency. From that it appears that symbols 1 to 14 were assigned to the major political parties which were of all India importance. It is probably for this reason that the notification provides that no candidate shall choose any of these symbols except with the permission of the Returning Officer. It is not clear as to what is exactly meant by the words "the permission of the Returning Officer" and when and in what manner that permission is to be granted. Mr. Gorwadkar contended that this permission is not the same thing as the final assignment of the symbol by the Returning Officer. He therefore argued that the words "no candidate shall choose except with the permission of the Returning Officer" refer to the initial choice made by the candidate in his nomination paper. We are not aware of any provisions which require the Returning Officer to grant permission merely for the expression of preferences in the nomination paper. That being the case, we have not been able to understand the exact meaning of the words "no candidate shall choose except with the permission of the Returning Officer". It is not necessary to pursue the point any further because we are not governed by the words of the notification issued by the Election Commission and we have only to follow the provisions of the Representation of the People Act and the rules framed thereunder. Rule 10 is quite clear on the point. It provides that the ultimate discretion in the matter of the assignment of the symbols rests with the Returning Officer. This discretion is to be exercised "subject to general or special directions issued by the Election Commission". The Returning Officer has also to consider the expression of choice as contained in the nomination papers.

27. Mr. Gadgil pointed out that the fact that the Election Commission decided to distribute the symbols party-wise means that they gave general directions to the Returning Officer for assigning particular symbols to candidates of particular political parties. We are inclined to accept this view. Respondent No. 1 changed the party table and therefore also changed his choice. He specifically requested the Returning Officer to assign him the symbol of the Congress Party. The Returning Officer was satisfied that respondent No. 1 was the authorised candidate of the Congress party. He was certainly not bound by the expression of the first choice because all that he is required to do is to "consider the choice" and assign a symbol "in conformity as far as practicable with his choice". The choice is neither irrevocable nor sacrosanct. The candidate may change the choice and the Returning Officer may consider the reasons for the change in choice and may assign him a different symbol than the one chosen by him in his nomination paper. The decision of the Returning Officer in assigning the symbol of the Congress party to the first respondent was not only not improper nor illegal but in our view perfectly legal and appropriate. It was also in consonance with the directions given by the Election Commission in relation to the assignment of the symbols.

28. In that view of the case it is not necessary to consider the question as to whether the decision of the Returning Officer in assigning a particular symbol to a particular candidate is liable to be called in question in an Election Petition, nor is it necessary to consider the question as to whether the assignment of the symbol of a pair of bullocks with a yoke to the first respondent and the use made by him of that symbol has materially affected the result of the election.

29. The only question that now remains for consideration is the question of limitation. It was conceded at the bar that the Tribunal has jurisdiction to decide the question of limitation. Subsection (4) of Section 90 of the Representation of the People Act, 1951, clearly contemplates that the final authority in deciding the question of limitation is the Tribunal.

30. Under rule 119 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1951, two periods of limitation have been laid down, one in clause (a) and the other in clause (b). The period of limitation under clause (a) is 14 days from the date of the publication of the notice in the Official Gazette under rule 113. The period of limitation under clause (b) is 60 days from the expiration of the time specified in sub-rule (1) of rule 112. It is conceded by Mr. Gadgil that if the present petition falls under clause (b) then it is in time. But he argued that the case falls under clause (a). In support of this argument Mr. Gadgil pointed out that in substance the application is against one returned candidate, namely respondent No. 1. He further pointed out that the ground stated in the petition came within the perview of Section 100(2)(c) of the Representation of the People Act. Section 100(2)(c) runs as follows:

> "that the result of the election has been materially affected by. . ...by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act or of any other Act or rules relating to the election... .. "

Mr. Gadgil contended that both the grounds stated in the petition, namely that the first respondent is below 25 years of age and that the assignment of the symbol of the pair of bullocks with yoke was improper came within the meaning of the words "non-compliance with the provisions of this Act" etc. Mr. Gorwadkar conceded that so far as the ground relating to the improper assignment of the symbol is concerned it does fall within clause (c) of sub-section (2) of Section 100. He however argued that the first ground, namely the respondent No. 1 was below 25 years does not come within the meaning of the expression "non-compliance with the provisions of the Act" etc. He contended that it falls under Sub-section (1)(c), that is improper acceptance or rejection of a nomination. We are inclined to agree with the view pressed by Mr. Gorwadkar because the word "non-compliance" generally connotes the failure to abide by the rules of procedure. The fact that the candidate was below 25 years of age would be a ground for his disqualification and would entail the inevitable consequence, namely the rejection of this nomination. Whether the ground was actually urged before the Returning Officer or not is entirely immaterial. It is clear that if such a ground were to have been urged before the Returning Officer he would have considered the same and passed his order either accepting or rejecting the nomination paper. That would necessarily attract the application of clause (c) of Sub-section (1) of Section 100 of the Act. Furthermore, it appears that the wording of clause (a) of rule 119 applies to a case where there is one returned candidate and the petition is against such candidate whereas clause (b) applies to the case where there are more returned candidates than one and the election petition calls in question the election as a whole. In the present case there are more returned candidates than one and in the prayer column the petitioner has prayed for setting the election aside as a whole. We have therefore no doubt in our minds that the petition is in time.

31. It is not necessary to consider Issues Nos 5 and 6 because the result of our findings on the main issues is that the petition fails

32. In view of the fact that the petition was largely based upon the date of birth mentioned in the school registers it cannot be said that the petition was baseless. The petitioner did have some ground for believing that the first respondent was under the prescribed age and thus unqualified to be chosen to fill the seat. That being the case, we are not prepared to saddle him with the costs of this petition. The proper order to pass is that the parties should bear their respective costs.

Order

The Petition is dismissed. The parties to bear their respective costs.

6th December 1952.

(Sd.) V A. NAIK, *Chairman.*
(Sd.) R. R. KARNIK, *Member.*
(Sd.) L. P. PENDSE, *Member.*

[No. 19/217/52-Elec.III.]

P. S. SUBRAMANIAN,
Officer on Special Duty.

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